

No. 22255 ✓

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GRANTON STANWOOD McHENRY,)

Appellant,)

vs.)

LAWRENCE E. WILSON, Warden,)
California State Prison,)
San Quentin,)Appellee.)

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LAWRENCE E. WILSON, Warden,
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Appellee.

APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for a writ of habeas corpus was invoked under Title 28, U.S.C., section 1915. The jurisdiction of this Court is conferred by Title 28, U.S.C., section 2253, which makes an order in a habeas corpus proceeding reviewable in the Court of Appeals when, as here, a certificate of probable cause has been issued.

STATEMENT OF THE CASE

Appellant appeals from the order of the United States District Court for the Northern District of California. denying his petition for writ of habeas corpus.

A. Proceedings in the state courts.

On October 18, 1960, appellant was convicted of

violating California Penal Code section 261.1 (statutory rape). He was sentenced to be imprisoned for the term prescribed by law (TR 88-89). There was no appeal.

On April 25, 1963, appellant was released on parole from state prison with regard to the above conviction for rape (TR 79).

Thereafter, on January 28, 1965, appellant was convicted of violating California Penal Code section 12021 (possession of a weapon by a felon). This judgment and conviction also reflects as a charged and proved or admitted prior felony conviction the above conviction for statutory rape in 1960. Appellant was sentenced to be imprisoned for the term prescribed by law (TR 86-87). There was no appeal.

Appellant's parole was subsequently canceled and his term on the 1960 rape conviction was refixed at the maximum (TR 79-81).

On September 15, 1965, the Monterey County Superior Court denied without opinion appellant's petition for writ of habeas corpus. The California Court of Appeal, First Appellate District, denied a similar petition on October 22, 1965. Subsequently, the California Supreme Court denied without opinion appellant's petition

for writ of habeas corpus on December 22, 1965 (TR 5). ^{1/}

B. Proceedings in the federal courts.

Appellant petitioned for writ of habeas corpus in the United States District Court for the Northern District of California on March 10, 1966 (TR 1). On May 26, 1966, the district court denied appellant's petition, concluding that appellant was barred by McNally v. Hill, 293 U.S. 131, 55 S.Ct. 24, 79 L.Ed. 238 (1934). Appellant filed a motion for rehearing on June 10, 1966, which was denied on July 22, 1966 (TR 61, 64). Appellant then filed a motion for certificate of probable cause on August 4, 1966 (TR 65), and, on September 1, 1966, the district court vacated the order of dismissal and dismissed the cause with leave to amend on the grounds that appellant had set forth allegations in his motion for certificate of probable cause which, if true, might merit further consideration by the court of the petition for writ of habeas corpus, if properly amended (TR 69). Appellant filed an amended petition on September 15, 1966 (TR 70), and an order to show cause was issued on January 6, 1967 (TR 73).

A return to the order to show cause and points and authorities in opposition to the petition for writ of

1. "TR" refers to the transcript of record on the proceedings in the district court.

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habeas corpus was filed by the California Attorney General on January 30, 1967 (TR 78). Appellant filed a traverse on February 15, 1967 (TR 96). The district court ordered a supplement to the above return on February 10, 1967 (TR 94), which was complied with by the California Attorney General on February 20, 1967 (TR 100). Appellant filed a traverse to the supplemental return on March 3, 1967 (TR 112).

On May 22, 1967, the district court denied appellant's petition for writ of habeas corpus (TR 118-125). Appellant filed motions for rehearing and for appointment of counsel on May 29, 1967 (TR 126-129), which were denied on June 8, 1967 (TR 130-131). Judge Zirpoli granted appellant's application for certificate of probable cause on June 26, 1967 (TR 135), and granted permission to appeal in forma pauperis on September 6, 1967 (TR 139). Notice of Appeal was filed on September 6, 1967 (TR 140).

APPELLANT'S CONTENTIONS

1. The district court misconstrued appellant's pleadings and thereby erred in refusing to grant an evidentiary hearing.

2. The district court should have appointed counsel to assist appellant in arguing the merits of his petition.

SUMMARY OF APPELLEE'S ARGUMENT

I. The district court properly denied appellant's petition, correctly concluding that it was without merit.

II. The district court properly refused appellant's request for counsel.

ARGUMENT

I

THE DISTRICT COURT PROPERLY
DENIED APPELLANT'S PETITION,
CORRECTLY CONCLUDING THAT IT
WAS WITHOUT MERIT.

Appellant argues that the district court misconstrued the facts stated in his petition and consequently the order denying appellant's petition was erroneous (AOB 8).^{2/} Although the district court may have misstated certain facts alleged in the petition, those facts did not form the basis for the court's decision and therefore appellant's argument is without merit.

The district court dismissed appellant's petition because the facts as alleged were unreasonable in the absence of some indication that appellant's counsel was inadequate or that he at least had informed

2. Appellant sets forth several examples of instances where the court's interpretation of the pleaded facts differs insignificantly from the facts as stated in the petition (AOB 10-13).

his counsel of the incredible plot against him (TR 124-25). The court points out that appellant does not say what role, if any, his counsel played in the decision to change pleas, and concludes that "it would be unreasonable . . . to assume that [appellant] . . . did not consult with counsel with respect to the advisability of entering a plea of guilty" (TR 125:14-17). The court found this omission more significant in light of appellant's alleged fear of asexualization (TR 125).

In the absence of some reference to the role of his counsel, appellant's allegations are "palpably incredible" and the denial of his petition was proper. Machibroda v. United States, 368 U.S. 487, 495 (1962); United States v. Fay, 336 F.2d 272 (2nd Cir. 1964).

We can only conclude, as the district court implies, that the only reason appellant does not allege any communication with his counsel respecting the plot to coerce his plea of guilty is that no such plot ever existed and his change of plea was purely voluntary. Certainly some minimum degree of candor must be exacted from state prisoners seeking federal habeas corpus relief. Compare In re Swain, 34 Cal.2d 300, 209 P.2d 793 (1956). In this respect, it should also be noted that appellant waited some five years after entry of his plea to present this

story to the courts, and then did so only after he had committed an offense which resulted in a second conviction and revocation of his parole.

II

THE DISTRICT COURT PROPERLY
REFUSED APPELLANT'S REQUEST
FOR COUNSEL.

Appellant also alleges that the district court should have appointed counsel to argue the merits of his petition (AOB 15).

With respect to counsel in habeas corpus proceedings in the federal courts, it has long been recognized that "indigent state prisoners are not entitled to court-appointed counsel unless under the circumstances of the particular case this is required in order to attain due process of law." Eskridge v. Rhay, 345 F.2d 778, 782 (9th Cir. 1965), cert. denied, 382 U.S. 996 (1966); accord, Hatfield v. Bailleaux, 290 F.2d 632, 635 (9th Cir. 1961), cert. denied, 368 U.S. 862 (1961); Schlette v. California, 284 F.2d 827, 836 (9th Cir. 1960), cert. denied, 366 U.S. 940 (1961). Obviously, the district court was of the opinion that appellant's case did not merit appointment of counsel and it was within his discretion to so order.

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CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the District Court denying the writ of habeas corpus should be affirmed.

DATED: November 1, 1967.

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of the State of California

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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

DATED: November 1, 1967.

MICHAEL J. KELLY
Deputy Attorney General

